No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENTS' BRIEF ON THE MERITS

ROBERT H. REVELL, JR.
Attorney for Respondents
Counsel of Record

JESSE W. WALTERS
Attorney for Respondents

Please Serve:

ROBERT H. REVELL, JR.
Attorney for Respondents
2402 Dawson Road, #3
Albany, Georgia 31707
(912) 434-0300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the United States Constitution prohibit a criminal defendant from exercising peremptory jury challenges based upon race?

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SUMMARY OF ARGUMENT

The Fourteenth Amendment does not preclude the exercise of peremptory challenges by the accused based on racial considerations. Because of the unique adversarial relationship of the criminal defendant and his or her attorney to the state, they are not state actors while in the exercise of the defendant's peremptory challenges, a traditional function of counsel. In addition, the state prosecutor does not have standing to raise the Fourteenth Amendment claims on behalf of the juror.

The right of an accused under the Sixth Amendment to a speedy and public trial by an impartial jury demands that the accused be allowed to exercise peremptory challenges without restrictions as was clearly intended by Congress and state legislative bodies in providing for such challenges. Hence, a defendant should not be barred from using peremptory challenges to remove a juror of another race because of possible racial bias against the defendant. To hold otherwise will subject an accused to trial by jurors who are or may be biased against him or her. In addition, the facts of the instant case demonstrate that the intentional injection of racial considerations into the case by the alleged victims and leaders of their race makes the peremptory challenge a necessary means by which the accused may attempt to eliminate any such bias from the jury panel.

ARGUMENT

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PRECLUDE THE EXERCISE OF A PEREMPTORY CHALLENGE BY THE CRIMINALLY ACCUSED ON THE BASIS OF RACE.

A criminally accused cannot in fairness, or by any sort of sound logic, be considered a state actor in exercising his constitutional and legal right to adequately defend his or her liberty or life against a charge in a court of law that he or she has committed a crime. A jury will decide the guilt or innocence of the accused and thus the loss of liberty or life. It cannot be reasonably concluded that the defendant's action in using peremptory challenges to eliminate from the jury those jurors whom the defendant apprehends will be biased against him or her constitutes state action. This is true even though the peremptory challenges are granted to him or her by the state; his or her trial is conducted in a court created by the state; in a building owned by the state; and the judge, an officer of the state, administratively but without the exercise of any discretion, requires the challenged juror to step aside. A contrary ruling would deprive the concept of state action of any significant and intelligible meaning. Such a conclusion is not dictated or justified by this Court's holdings in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. ___ (1991); or *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).

Batson holds that, in a criminal case, the district attorney, an officer and alter ego of the state in the prosecution of the defendant, cannot, on behalf of the state, use peremptory challenges to eliminate jurors based upon the

juror's race. This was clearly a case involving a state actor, and therefore state action.

In *Polk County v. Dodson*, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981), this Court held that a public defender does *not* act under color of state law when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding and consequently was not liable for alleged violations under 42 U.S.C. § 1983 of the defendant's constitutional rights.

This Court now has before it the issue of whether a privately retained defender is acting under color of state law when representing a nonindigent defendant in a state criminal proceeding, in the context of exercising peremptory jury challenges.

In *Polk* the Court acknowledged that lawyers representing clients are not state actors by virtue of being officers of the court within the meaning of Section 1983, and emphasized the *adversarial relationship* between the state and the defendant as opposing parties in a criminal trial:

> . . . In our system a defense lawyer characteristically opposes the designated representatives of the state. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the state or in concert with it, but rather by advancing the undivided interest of his client. This is essentially a private function, traditionally filled by retained counsel for which the state office and authority are not needed. *Polk*, supra, at 516-517.

The Court further held with regard to *state action* that the status of the public defender is not distinguishable from the private attorney in the representation of his client:

> But a defense lawyer is not, and by the nature of his function, cannot be the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA31970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. *Polk*, supra, at 518.

If the state must respect the professional independence of a public defender which it employs in the representation of the defendant, and the public defender in that representation is not acting for the state because of the public defender's adversarial and wholly antagonistic relationship to the state, then this Court cannot logically hold that the defendant in a criminal case or his or her attorney is a state actor, and the action of the attorney in exercising the defendant's peremptory challenges is state action without overruling *Polk*.

To hold otherwise would render a state criminal defendant's right to " . . . the guiding hand of counsel at every step in the proceeding against him . . . " meaningless. *Gideon v. Wainwright*, 372 U.S. 335 at 345, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); Sixth Amendment.

> Implicit in the concept of a guiding hand is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. *Polk*, supra, at 519.

Clearly, the right of a defendant to defend himself in a court of law is permanently compromised when his counsel is deemed to owe a duty to the state in the manner and means in which the peremptory challenge is exercised but at the same time to owe to the client the guiding hand at every step in the proceedings against him to protect him from the state.

While the Court in *Polk* acknowledges that a public defender may engage in activities that might be deemed state action, the examples cited are activities clearly outside the scope of the traditional functions of representation of clients, i.e., hiring and firing decisions on behalf of the state and certain administrative and possibly investigative functions. *Polk*, supra, at 520.

Much has been written about the traditional and longstanding importance of the peremptory challenge and its use in the defense of criminal defendants. Clearly, under the rationale and holding of *Polk*, the criminal defense attorney is performing a traditional function of counsel within the adversarial process against the state while exercising a peremptory challenge in striving to provide for his client a jury free from those who may be biased against him. The attorney cannot and should not be deemed a state actor with a duty to the state and at the same time properly represent his client.

The defense attorney cannot serve two masters – the state and his client. If a defense attorney in representing a defendant accused of a crime is a state actor in exercising peremptory challenges, then the attorney must be considered a state actor in every phase of the trial, which on its face cannot be correct, theoretically or otherwise.

In *Edmonson* this Court had before it the issue of "whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges." Supra, at 674. That was a civil case in which the black plaintiff accused the corporate defendant of exercising race-conscious peremptory challenges.

In *Edmonson* the Court distinguished the ruling in *Polk* because the public defender occupied an adversarial relationship to the state (just as is true with respect to a private attorney representing a defendant in a criminal case and even more so since the private attorney *is not hired by the state* and *the cost of the attorney's services are paid by the defendant*) and was therefore not a state actor whereas the attorneys in *Edmonson* had no such adversarial relationship.

With regard to the concept of state action, there is a significant difference, insofar as relationship to the state is concerned, between parties engaged in the trial of a civil case and a defendant in a criminal case, defending a criminal charge by the state. See *Polk*, supra.

In a civil case, the parties, with regard to their private legal duties and obligations, are not in a litigious or adversarial and antagonistic relationship with the state, but are merely utilizing the privileges accorded them by the state as a means of settling their differences.

The ruling that the parties in a civil action, in exercising their peremptory challenges, "in all fairness must be deemed government actors" (*Edmonson*, supra) cannot logically be applied to a defendant in a criminal case. The government is a party acting for itself, and, in any view, is the defendant's staunch and bitter adversary. In no

realistic sense, whether it be in the use of peremptory challenges, introducing evidence or otherwise participating in the trial, is the defendant a state actor or his conduct state action. Instead of the harmony between the parties and the state, as in civil actions, there is complete discord and strife between the criminal defendant and the state, and there is no reasonable theory upon which it can be said that the defendant, in protecting his liberty and perhaps his life, is acting for the state.

Edmonson recognized that the civil litigant's status as a state actor is determined through a careful analysis of the facts of each case, "a fact-bound inquiry," and applied the state actor analysis of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982). *Lugar* held that the action of a creditor in suing upon a prejudgment attachment under which the debtor's property was seized by the sheriff, a state officer, constituted state action. Under the second phase of the analysis, the following criteria were applied to hold the private litigants to be state actors in the exercise of their peremptory challenges:

1. The extent to which the actor relies on governmental assistance and benefits;

2. Whether the actor is performing a traditional governmental function; and

3. Whether the injury caused is aggravated in a unique way by the incidence of governmental authority.

We submit that it cannot be fairly said that in the trial of a criminal case either the defendant or his attorney

relies on governmental assistance and benefits or is performing a traditional governmental function in resisting the government's accusation. In no sense is the use of a peremptory challenge to eliminate a juror on any ground an injury to the juror which is aggravated in a unique way by the incidence of governmental authority. Of course, the defendant has certain constitutional rights bestowed upon him and certain legislative rights apparently thought by those bodies as being rights that he should have the right to exercise himself, but they cannot be classified as "governmental assistance and benefits."

The ruling sought by the state in this case finds no support from, but is contrary to, the underlying theory of state action as found in the court's rulings that a court should not use its judicial power to enforce racially restrictive covenants as in *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441 (1948); or that the actions of the executrix of an estate in providing notice to creditors that they might file claims could be fairly attributable to the state because those private actors were *compelled and required* to take certain actions by the state probate court as in *Tulsa Professional Collection Services, Inc., v. Pope*, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988).

It is significant that no criminal defendant is compelled by the state to exercise a peremptory challenge. Such an exercise is always a private strategic decision made solely by the accused and the attorney based upon the facts and circumstances of the case.

The involvement of the government in the criminal defendant's exercise of peremptory challenges falls far

short of the "interdependence or joint participation" between the private actor and the state which was described in *Burton v. Wilmington Park Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).

The standard and criteria used to determine whether actions by a private actor constitute action under color of state law should be governed by this Court's holding in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974):

> Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into state action . . . *Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the state does not make its action in doing so state action for purposes of the Fourteenth Amendment*. 419 U.S. 345, 357 (emphasis added).

Because the government judge merely administratively acquiesces in the criminal defendant's private decision to exercise a peremptory challenge, the traditionally required "overt, significant participation" by the government is totally lacking in the exercise of a peremptory challenge by a criminal defendant.

If the exercise of a peremptory challenge by defense counsel is deemed to be state action, then any of the "traditional functions" of defense counsel could fall under attack as state action constitutionally offensive to

jurors, witnesses, or the public at large.[1] Such a result will clearly undermine the criminal adversary process.

The actor in the instant case, the criminal defense attorney, is argued by petitioner to be performing a traditional governmental function in the exercise of a peremptory challenge because he or she exercises a statutory say-so in selecting the jury. The theory advanced is that since the ultimate decision by the jury will constitute the authority of the government, then somehow the decisions of the accused and his or her attorney in determining

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[1] For example, in the event this Court extended the state actor analysis of *Edmonson* to encompass the criminal defendant during his adversarial battle with the state in the criminal trial, could not jurors or witnesses complain of an Equal Protection violation when asked questions by defense counsel to determine racial bias in the case? We know that the rules and regulations permitting and governing voir dire are statutory; are asked in a public courtroom during a trial; and, the judge participates by supervising, or conducting, or limiting the voir dire. Could a criminal defense attorney then be deemed a state actor during opening statement, the questioning of witnesses, or the closing argument because such actions are pursuant to rules and regulations provided by law, conducted in a public courtroom during a trial, and done by tacit permission and authority of the trial judge?

Assume that a defense attorney peremptorily challenges and excuses a juror based upon racial considerations but the prosecutor interposes no objection thereto. Would the excluded juror have a cause of action against the defense attorney under 42 U.S.C. § 1983 for damages for the alleged violation of the juror's constitutional rights? In the context of such an action, what would be the controlling principle, whether the defendant reasonably believed in good faith that the juror might be biased against him or her; or whether the juror was in fact biased against the defendant?

selection of the jury are therefore absorbed into the decision of the government.

The Court states that in the context of a civil trial the sole purpose of the peremptory challenge is to permit litigants to *assist the government* in the selection of an impartial jury. *Edmonson*, supra, at 674. While this may be arguably true in the civil context, such a concept does not exist in the context of a criminal trial. On the contrary, the criminal defense attorney is in mortal combat against the government in all phases of trial, including jury selection. In practice, during jury selection the government would be inclined to exclude those jurors which the criminal defendant would prefer, and the criminal defendant inclined to exclude those jurors which the government would prefer.

To say that the criminal defendant is a state actor because he or she is assisting the government at any phase of the criminal trial process is inconsistent with the criminal adversary system. This Court has clearly so indicated by its ruling in *Polk* where it was held that a public defender is not to be considered a state actor. Then, in *Edmonson*, a civil case in which the parties were held to be state actors in exercising their peremptory challenges and would therefore violate a juror's Fourteenth Amendment rights by challenging a juror because of his race, the Court distinguished *Polk* on the grounds that the public defender in *Polk* was in an adversarial position with the government. *Edmonson*, supra, at 677 and 687. Hence, this Court in effect has *twice ruled* that in a criminal trial, a person involved therein in an adversarial relationship with the government is not a state actor.

We respectfully submit that if this Court holds an attorney representing a defendant charged with a crime to be a state actor and his actions in using the defendant's peremptory challenges state action, predicated on the idea that the attorney is exercising (by choice and not by compulsion) rights granted by the state and that the state provides for a trial in which the challenges are exercised, then the Court will have destroyed the now necessary element of state action with respect to rights arising under the Fourteenth Amendment since every private citizen who exercises a right granted under a statute in connection with the enforcement of his or her rights will thereby logically become a state actor and his or her actions state action.

Finally, the state prosecutor is without standing to assert the claims of a juror in a criminal trial. Basically, the state prosecutor suffers no "injury in fact" by virtue of the exercise of a peremptory challenge by a criminal defendant with relation to a juror. The state is deprived of no right. In addition, neither Congress nor the state of Georgia has conferred standing upon the state prosecutor to raise such claims. See generally *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361 (1972); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

THE RIGHT OF THE ACCUSED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY DEMANDS THAT THE ACCUSED CONTINUE TO EXERCISE THE USE OF PEREMPTORY CHALLENGES WITHOUT RESTRICTIONS.

The Sixth Amendment to the United States Constitution and the equivalent provision of the Georgia Constitution (Article I, Section I, paragraph XI) guarantee that the *defendant* shall have a public and speedy trial by an impartial jury. Such a requirement is clearly implied in the Fourteenth Amendment. As this Court said in *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed. 411 at 426, 111 S.Ct. 1364 (1991), "Jury selection is the primary means by which a court may enforce a *defendant's* right to be tried by a jury free from ethnic, racial or political prejudice." *Rosales-Lopez v. United States*, 451 U.S. 182, 68 L.Ed.2d 22, 101 S.Ct. 1629 (1981); *Ham v. South Carolina*, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973); *Dennis v. United States*, 339 U.S. 162, 94 L.Ed. 1364, 70 S.Ct. 799 (1950); or predisposition about the defendant's culpability, *Irving v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961); *Gomez v. United States*, 490 U.S. 858, 104 L.Ed.2d 923, 109 S.Ct. 2237 (1989) (emphasis added).

In our imperfect world racial bias of one race toward another still exists.[2] Judicial decree will not obliterate that

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[2] Race is a biological fact. Racism, the inherent characteristic of which is the treatment of one race or another as being inferior, subordinate and not worthy of the same privileges and rights of some other race, is clearly despicable, unworthy

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fact. See generally *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), and *Batson*.

An *impartial* jury is defined as a jury "not partial; unprejudiced"[3] and as "not partial, without prejudice, not

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and unacceptable. This clearly is, and should be, the attitude of our judicial and governmental system. Nevertheless, among all races there undeniably and understandably exists racial pride, loyalty and fellowship. The recognizable preference for one's own ethnic group in certain contexts and settings unavoidably spawns unfriendliness, discord, enmity and hostility between races, resulting, whenever a choice must be made, in the very human tendency of a member of one race unwittingly to favor his or her race.

In the situation of a criminal defendant who is engaged in the most important contest in which he will ever engage, a struggle to preserve his or her liberty and perhaps his or her life, a rule that forbids him or her from weighing the foregoing considerations in using peremptory challenges most certainly deprives a defendant of what should be his right not to be placed even in the likelihood of being tried by jurors who are biased against his or her race. Such contemplative and careful use of his or her challenges is one of, if not the most important defensive measures a defendant has to protect himself or herself against an unjust conviction, and such a course of conduct does not amount to invidious discrimination.

It may be that under the contrary ruling sought by the state, justice will be blindfolded as to racial and ethnic considerations in the context of selecting a jury; nevertheless, justice will also be blind as to the right of a defendant to a constitutionally fair trial by jurors who, by virtue of racial attitudes, may be incapable of giving the defendant a fair trial.

[3] William Morris, ed., American Heritage Dictionary of the English Language, New York, New York, p. 659.

taking sides, unbiased."[4] A *partial* jury is defined as ". . . 2. Favoring one person or side over another or others; biased; prejudiced,"[5] and "affecting only a part of, not total, inclined to favor unreasonably."[6]

If the defendant's right to an impartial jury does in fact mean that an accused has a constitutional right to not be tried by a juror who is biased against him or her, or even whom the defendant believes for specific reasons may be so biased against him or her, then there must be an appropriate means, such as peremptory challenges, for the accused to implement his constitutional right. The defendant must have some reasonable, workable means of protecting that right.

An impartial jury doesn't simply appear by the summoning of a qualified venire, which mirrors the racial, gender, and ethnic makeup of the community. Each of those venire members comes to the Court with a lifetime of "baggage" of collective experiences, attitudes and opinions, which make that juror more or less impartial than the next juror. By what means can the defendant reasonably "inspect that baggage" to learn whether jurors, because of racial factors, may be impartial?[7]

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[4] John Gage Allee, ed., Webster's Dictionary, U.S.A., p. 186.

[5] Morris, p. 955.

[6] Allee, p. 270.

[7] It is clearly not adequate to protect the right of a defendant against jurors who for any reason may have a bent of mind against him or her, due to the possibility of disqualifying racial attitudes, to circumscribe a defendant's right to

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Petitioners have asserted that at trial the counsel for the respondents " . . . have clearly indicated their intention to use their peremptory strikes in a racially discriminatory manner . . . " Brief of Petitioner, p. 5.

Respondents clearly have no idea at this stage of the proceedings as to how and for what reasons they will exercise their peremptory challenges, only that they will be exercised pursuant to the law but in total regard for the defense of the clients. Respondents have not been to trial, nor been confronted with a jury panel.[8]

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challenge a juror of another race only in situations when the defendant is able to actually establish racial prejudice of the juror. In that situation, the defendant does not need a peremptory challenge since the juror would be excused for cause. However, aside from this, bias is something that no person wishes to acknowledge. General voir dire questions concerning impartiality or even specific questions concerning racial bias, will not serve the purpose; but, at best, if a juror harbors racial bias, only a meaningful and thorough cross-examination will suffice, and even that may not succeed. Sometimes, a person may not be able to recognize his or her own racial bias. In the light of the courts' somewhat limited restricted view of voir dire questions [(Annots., 28 A.L.R.Fed. 26 (1976); 94 A.L.R.3d 15 (1979); 54 A.L.R.2d 1204 (1957)] such an examination of a juror may not even be allowed. Even so, a defendant, recognizing his or her limited chance of success, would be put into a critical quandary of whether to enter into such a vigorous examination, realizing that it would irritate and alienate the juror so that if the voir dire examination was unavailing to show bias, he would be saddled with a truly unfriendly juror. No defendant, in a good faith effort to protect his freedom, should be placed in such a position.

[8] There is no way for the parties in this case to determine or estimate the ethnic, racial or gender makeup of the jury. The

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One obvious reason that a criminal defendant of one race may act to peremptorily challenge a juror of another race is the fear that the juror may harbor some degree of ill will towards the defendant's race, and as a result, might, for that reason, be more inclined to vote for conviction. That fear may be more intense where the victim of the crime and the government's witnesses are of the same race as the juror. It may be even more vivid where a community organization composed of members of the race of the juror and the victim, has widely circulated a pamphlet in which the defendant is adjudged without benefit of trial to have unjustifiably assaulted the victims because of their race and calling upon the race of the victim to retaliate by boycotting the defendant's business. (JA 38).

If a criminally accused defendant is constitutionally entitled to be tried by a jury free of jurors that are or even may be biased against him or her, any rule that prohibits the defendant from considering racial attitudes in using peremptory challenges will, in reasonable likelihood, deprive the defendant, whatever his race, of that critical constitutional right.

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jury panel placed upon respondents (when the case is called for trial) may be vastly different from the racial composite indicated by the census. The jury panel may be composed totally of those excluded or not chosen from other jury panels throughout the trial term. This may drastically alter the makeup of the jury panel as compared to the original venire and greatly affect the decisions as to how and why peremptory challenges are exercised.

The NAACP Legal Defense Fund amicus brief suggesting reversal of the Georgia Supreme Court clearly recognizes this fundamental problem at pages 8 and 9:[9]

2. The Right of a Defendant to an Unbiased Jury.

> A criminal defendant has the right not to be tried by a racially biased jury. *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524 (1973). Often, voir dire and challenges for cause are not enough to protect a defendant, and any minority defendant faced with the possibility of biased jurors must have recourse to peremptory challenges.
>
> In theory there is a distinction between a race-based peremptory challenge used to discriminate invidiously in violation of *Batson*, and a peremptory challenge used to prevent discrimination by removing a juror whom the defendant believes harbors racial prejudice. In practice, however, it may often be difficult for the trial court to distinguish between the two cases, just as often the voir dire, if the circumstances of the case do not permit a searching

[9] Thus, amicus recognizes that the ruling sought here by the state could be perilous to the rights of a black defendant, although it proposes that the court adopt the anomalous solution that a black defendant be permitted to strike white jurors because they are white in order to get black jurors on the jury; but that since racial animus is involved in the crime with which the defendants here are charged (an element manufactured by leaders of the black community), the court should prohibit the defendants from challenging black jurors because they are members of the race that the defendants are charged with victimizing; presumably, so they can show their resentment in exercising their functions as jurors.

> inquiry into racial prejudice, may not be able to elicit sufficient proof of bias to permit a challenge for cause. Whatever the injury to a prospective juror of being excluded from a particular jury, the injury to a defendant by being tried by a jury infected with racial prejudice is far greater.

This Court implied in *Powers* that racial factors could be relevant with regard to jury selection when discussing the white defendant's objection to the prosecutor's exclusion of black jurors.

> " . . . The record does not indicate that race was somehow implicated in the crime or the trial; nor does it reveal whether any black persons sat on petitioner's petit jury or if any of the nine jurors excused by peremptory challenge were black persons . . . " at 420.

The peremptory challenge in which the defendant may act without the constraint of the state and without the discretion of the supervising judge is the only means available for the defendant to combat possible bias on his jury and enforce his constitutional rights to a fair and impartial trial. Otherwise, the state will dictate to the defendant which jurors he must accept. Clearly, the peremptory challenge was and is the *mechanism* to give the defendant the tool to eliminate even suspected partial jurors.[10] Although not perfect, it protects the interest of the defendant in his adversarial relationship to the state.

[10] The idea of peremptory challenges is a perfectly valid and reasonable system of attempting to find a fair and impartial jury to determine the guilt or innocence of a defendant

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A holding in this case that the defendants are precluded from exercising peremptory challenges to challenge black jurors because of racial bias against the defendants and their race would amount to a holding that there can never be a situation in which there are racial considerations which could cause there to be general bias by members of one race toward the race of the accused in the criminal trial.

Such a result is repugnant not only to the rights secured by the constitutional rights of a defendant charged with a crime but to the wisdom and foresight of those who recognized that the peremptory challenge was a practical and necessary method to deal with juror bias.

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accused of criminal conduct. It is not an arbitrary system, but is based on the reasonable assumption that jurors will not always voluntarily admit to hostile feelings or even unfriendly feelings towards others which, from the very nature of human beings, would lead them to champion the cause of one side or the other.

The laws, found everywhere, which automatically eliminate jurors on account of kinship to parties involved in a judicial controversy, are clearly based on the assumption that, as a known and understandable trait of human beings, the juror would tend to favor his or her kin. This same natural trait is to be found among the many races which are represented by the citizens of this country, and there is no reason to prohibit a defendant charged with crime from recognizing this human tendency in attempting to protect himself or herself from a biased conviction.

In *Strauder* this Court held that total exclusion of blacks from jury service because of their race "is practically a brand upon them, affixed by the law; an assertion of their inferiority." However, the act of a defendant in challenging a juror of a different race does not assert the inferiority of, or in any real sense, put any kind of brand on the juror – it is simply an expression of apprehension and fear by a defendant charged with a crime that the juror may to some degree harbor hostility or enmity towards the defendant's race; and, therefore, may be less than objective in determining the innocence or guilt of the defendant, and especially is this a factor that such a defendant ought to be allowed to consider when the victim of the crime is a member of the juror's race.

The ruling in *Batson* prohibiting the government from challenging a juror for no other reason than the similarity of the juror's and the defendant's races operates to give the defendant a better opportunity of having jurors of his own race on the jury. That same purpose cannot be carried out but will in fact be thwarted by barring a defendant from challenging members of another race, whom he believes, rightly or wrongly, because of racial considerations, may be more inclined to arrive at a verdict of guilty. The *Batson* rule deprives the government of nothing to which it is entitled. It simply says that the government should not deprive a defendant charged with crime of whatever advantage it may be to the defendant of having members of his race on the jury. Here, the Court is urged to deprive a defendant of whatever advantage it might be to have jurors of his or her own race on the jury. Such a result is not mandated or warranted by the *Batson* ruling.

It is argued that since in *Batson* the Court has prevented the state from using peremptory challenges to eliminate jurors of the defendant's race (or any other race) when the challenge is race based, the Court should likewise not allow a defendant to use peremptories to challenge a juror of another race even though the defendant reasonably fears the racial bias that the juror may have will tend to tilt the juror's thinking against the defendant and in favor of the state or even though, by so using the challenge, the defendant will be able to put a juror of the defendant's own race on the jury: since, it is said thereby the defendant will be given a greater opportunity to shape the jury than will the state. It is bemoaned that such would not be "fair to the state." This argument, being nothing more than "tit for tat" in character, bears no credibility.

If there is one clear conclusion which stands out in an overview of the criminal jurisprudence of this country it is that through constitutional provisions and other laws the state and a defendant do not enter the judicial arena equally armed. The defendant enters with the presumption of innocence which the state must remove, not by the preponderance of the evidence, but beyond a reasonable doubt. The state must furnish to a defendant any evidence favorable to the defendant that it discovers; whereas, a defendant who discovers evidence favorable to the state is under no duty to disclose it to the state and may even take steps to secrete it. A defendant in federal courts and in a number of states is given more peremptory challenges than the state. It seems self-evident that the defendant's increased ability by virtue of *Batson's* disarming the state of use of its peremptory challenges

based upon race, to eliminate from the trial jury members of another race whom the defendant fears may be influenced against him by race-based emotions of racial loyalty, enmity, hostility and the like, will be doing nothing more than assuring the defendant that he or she will *not* be tried (and convicted) by a partial jury contrary to his constitutional rights. That in the process of using peremptory challenges, a defendant may be able to obtain a jury which by race or otherwise is, or might reasonably be concluded to be, favorable to him, is simply a result of his constitutional guaranty of not being tried (and convicted) by a jury that is biased against him or her; and violates no rights of the state nor of the jurors so removed.

While in theory a criminal defendant has no constitutional right to a jury biased in his or her favor, this does not lead to the conclusion that the defendant must use peremptory challenges only with the view of producing a jury which might be reasonably viewed as being impartial to both the defendant and the state. If a defendant can use his or her challenges so as to produce a jury which may be sympathetic to him or her, this violates no right of the state.

The fundamentally difficult decision to make in this case is that we must continue to allow the exercise of the peremptory challenge without restriction by the criminally accused to ensure fair and impartial juries under the Constitution even though the exercise of such peremptory challenges may in certain cases exclude jurors because of racial factors.

Such a decision is analogous to Justice Harlan's defense of our constitutional safeguards in the criminal

adversary proceeding when he stated, "It is better for a guilty man to go free than to convict an innocent man." *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, at 386, 90 S.Ct. 1068 (1970). Is it not better for a juror to be excluded by race than to risk an accused being tried by jurors who might be biased against him?

CONCLUSION

For all of the foregoing reasons, the Georgia Supreme Court should be affirmed, and this Court should hold that the United States Constitution does not prohibit a criminal defendant from the unrestricted exercise of peremptory jury challenges.

Respectfully submitted,

ROBERT H. REVELL, JR.
Attorney for Respondents
Counsel of Record

JESSE W. WALTERS
Attorney for Respondents

Please Serve:

ROBERT H. REVELL, JR.
Attorney for Respondents
2402 Dawson Road, #3
Albany, Georgia 31707
(912) 434-0300